

INTERNAL REVENUE SERVICE
NATIONAL OFFICE TECHNICAL ADVICE MEMORANDUM

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Third Party Communication: None
Date of Communication: Not Applicable

Index (UIL) No.: 2041.02-00
CASE-MIS No.: TAM-133605-08

Taxpayer's Name:
Taxpayer's Address:

Taxpayer's Identification No
Date of Death:
Date of Conference:

LEGEND

Decedent =
Settlors =
Trust =

Year =
Date 1 =
Date 2 =
State =
Cite 1 =

Cite 2 =

Cite 3 =

Cite 4 =

Cite 5 =

Cite 6 =

Cite 7 =

Cite 8 =

Cite 9 =

ISSUES

1. Whether Decedent possessed at death a general power of appointment within the meaning of § 2041 of the Internal Revenue Code over property held in Trust.

2. If Decedent possessed at death a general power of appointment, what is the extent of the interest in Trust over which Decedent held the power?

CONCLUSION

1. Decedent possessed at death a general power of appointment within the meaning of § 2041.

2. Decedent held a general power of appointment over the right to receive distributions of net earnings and the right to distribution of Trust corpus at the termination of Trust.

FACTS

In Year, Settlers created Trust for the benefit of _____, Decedent. Year is _____. The introductory language of the Trust instrument states that "

" and that they "

." Trust

is then divided into four sections:

sets forth the responsibilities and powers of the Trustees, while Article II sets forth those of the . , provides as follows:

.

.

.

, provide:

Decedent died testate on Date 1, a resident of State. During his life, Decedent was the sole beneficiary of Trust. Decedent's Last Will and Testament was executed on Date 2. of Decedent's Will provides, in part, as follows:

The parties agree that Decedent possessed a power of appointment and that Decedent fully exercised his power of appointment over his entire interest in Trust.

LAW AND ANALYSIS

Section 2041(a)(1) provides that the value of the gross estate shall include the value of all property to the extent of any property with respect to which a general power of appointment created on or before October 21, 1942, is exercised by the decedent (A) by will, or (B) by a disposition which is of such nature that if it were a transfer of property owned by the decedent, such property would be includible in the decedent's gross estate under §§2035 to 2038, inclusive; but the failure to exercise such a power or the complete release of such a power shall not be deemed an exercise thereof.

Section 2041(b)(1) defines the term "general power of appointment" as a power exercisable in favor of the decedent, the decedent's estate, the decedent's creditors, or creditors of the decedent's estate.

Section 20.2041-1(b) of the Estate Tax Regulations states that a power of appointment includes all powers that are in substance and effect powers of appointment, regardless of the nomenclature used in creating the power.

A power of appointment is presumed to be general unless the settlors manifest an intent to exclude as appointees the donee, the creditors of the donee, the donee's estate and the creditors of the donee's estate. Restatement 2d of Property (Donative Transfers) § 12.2 (1986).

State law and the trust instrument determine whether a power is a general power of appointment. The rules of construction of wills and trusts under State law are well settled. If the language of a trust is unambiguous and expresses the intent of the settlor, it is unnecessary to construe the instrument because it speaks for itself. Cite 1; Cite 2. A court should give effect to every part of the instrument if the language is reasonably susceptible to a harmonious construction. Cite 3. The court must focus on the testator's intent, and, in so doing, the intent must be drawn from the will, not the will from the intent. The court focuses not on what a testator may have intended to write, but the meaning of the words actually used. Courts must not redraft wills to vary or add provisions under the guise of construction of the language of the will to reach a presumed intent. Cite 4; Cite 5; Cite 6.

When a testator uses the same words in different parts of a will with reference to the same subject matter, it is presumed that the testator intended the words to have the same meaning unless the context indicates the testator used the words in a different sense. The court must presume the testator intended every word he used to have a meaning, and the court must give common words their plain meaning unless the context indicates they were used in another sense. A testator is presumed to have been familiar with the ordinary and natural meaning of the words used in the will. Cite 7; Cite 8.

State law also is clear that unambiguous language cannot be diminished by a subsequent clause. At issue in Cite 9 was whether a will provision granting a wife a life estate with a power of disposition was restricted by the provision appointing her co-executor. In holding that the wife held a general power of appointment, the court stated that “

”
.

Cite 9.

Issue 1

In this case, _____ of the trust instrument provides that at the time of Decedent's death, the Decedent's equitable interest, " _____ " is to pass to his heirs at law. The parties agree that this language grants Decedent a testamentary power of appointment and that Decedent exercised the power upon his death on Date 1. There is, however, a question as to whether the power of appointment is a general power of appointment.

_____ of Trust sets forth the rights and powers that Decedent, as the sole beneficiary, held in Trust. _____ provides that Decedent has (1) the right to receive distributions of net earnings awarded to him by the Trustee with the consent of _____, and (2) the right of distribution of the Trust Estate made by the Trustee at the termination of Trust, whether at the expiration of the period fixed for its existence or by voluntary dissolution. _____ does not grant Decedent a right to Trust corpus during Decedent's lifetime. _____ provides that, at the time of Decedent's death, his equitable interest in Trust, " _____, " shall pass to and vest in his heirs in accordance with the laws of descent and distribution then in force.

Section 2041(b)(1) defines the term "general power of appointment" as a power exercisable in favor of the decedent, the decedent's estate, the decedent's creditors, or creditors of the decedent's estate. Whether the power is exercisable in favor of a decedent's estate, the creditors of the decedent's estate, or the creditors of the decedent is dependent on State law and the terms of the instrument. The general rule is that a power of appointment is presumed to be general unless the settlors express the intent to exclude as appointees the donee, the creditors of the donee, the donee's estate, and the creditors of the donee's estate. Restatement 2d of Property (Donative Transfers) § 12.2 (1986). There is no indication that State courts would not follow this general rule. To determine whether the Settlers intended to exclude the parties listed in § 2041(b) as potential appointees, State law requires an examination of the words actually used in the instrument. Moreover, the words used by the settlor are presumed to have a meaning that is consistent with the plain meaning of the words. The language used by Settlers in _____ is unambiguous and clearly expresses the Settlers' intent. The language does not restrict in any manner the Decedent's ability to exercise the power of appointment in favor of his estate, his creditors, or the creditors of his estate. Therefore, we conclude that the power granted Decedent in Trust is a general power of appointment.

Decedent's estate notes that: (1) Decedent was entitled only to discretionary distributions of income during his lifetime but not distributions of corpus; and (2) Trust did not terminate at Decedent's death but will continue for _____ years thereafter. Therefore, the estate argues that the entire trust document rather than the specific language granting the power of appointment must be examined to determine Settlers' intent. The estate concludes that such an examination reveals that Settlers did not

intend to provide Decedent with a general power of appointment. We disagree. It is well settled under State law that, if the specific language used by a settlor is clear, it is unnecessary to construe the instrument as a whole because the language speaks for itself. Courts must not redraft instruments to vary or add provisions under the guise of construction of the language to reach a presumed intent.

We believe, however, that even if the Settlers' intent were determined by an examination of the entire trust instrument, our conclusion that Decedent possessed a general power of appointment is clearly consistent with the overall intent specifically set forth in the four corners of the document. Beginning with the introductory language in the trust instrument, the Settlers explicitly provide that Trust is for the " " of the Decedent. No Trust provision allows for distributions to or for the benefit of anyone other than Decedent, including any of Decedent's descendants. The language used to create the power of appointment permitted Decedent to determine, without restriction, who would receive Decedent's entire interest in Trust. Allowing Decedent to control the disposition of the Trust Estate in this manner is consistent with Settlers' goal as stated in the introductory language.

In addition, we believe the fact that the Decedent could receive only income at the discretion of the trustee and could not receive distributions of corpus during life, is in no way indicative of the Settlers' intent to restrict Decedent's power to appoint the property at his death. A right to receive trust income and a power of appointment are separate interests among the possible interests that a beneficiary may have in a trust. It is the province of a settlor to control the rights and interests set forth in a trust according to the settlor's own wishes. Furthermore, the fact that any appointee must wait until termination of Trust to receive a distribution is irrelevant in determining whether the power is a general power of appointment. The obvious fact that Decedent himself could not possibly receive Trust corpus at its termination years after his death in no way precludes receipt by Decedent's estate, Decedent's creditors, or the creditors of Decedent's estate.

Issue 2

Having concluded that Decedent possessed at death a general power of appointment, it is necessary to determine the extent of the interest in Trust over which Decedent held the power. The examining attorney has indicated that an argument has been advanced that Decedent's power to appoint extended only to the discretionary right to receive income from Trust during the period commencing from Decedent's death and lasting until Trust terminates years thereafter. We disagree.

As discussed above, provides that Decedent has (1) the right to receive distribution of net earnings awarded him by the Trustee with the consent of , and (2) the right to receive distributions of the Trust Estate made by the Trustee at the termination of Trust, whether at the expiration of the period fixed for its existence or by voluntary dissolution. specifically provides that Decedent had no right to the corpus of Trust during Decedent's lifetime.

provides that, at the time of Decedent's death, his equitable interest in Trust, unless disposed of otherwise by Decedent, shall pass to and vest in his heirs in accordance with the laws of descent and distribution then in force.

As noted above, State law provides that when the same words appear in different parts of an instrument, it is presumed that the settlor intended the words to have the same meaning. Under the terms of Trust, in those situations when the Settlers desired to limit the distributions to the Decedent to Trust income, the Settlers utilized specific language to achieve this result. For example, the terms " " and " " are used throughout the trust instrument by the Settlers to make it clear that the trustees could distribute only income to Decedent during his life. Similarly,

provides that Decedent was not to receive any distributions of corpus during Decedent's life, but that Decedent was entitled to the right to receive distributions of the Trust Estate made by the Trustee at the termination of Trust, whether at the expiration of the period fixed for its existence or by voluntary dissolution. is the only section of the entire instrument in which the term " " is used. If the Settlers had intended to limit the exercise of Decedent's power of appointment to only the discretionary income interest, they would have done so by using terms such as " " or " " as they did in other sections of the trust instrument.

Instead, Settlers chose to grant Decedent a power of appointment over his entire " " in Trust to make certain that any exercise of the power of appointment would not be limited and would encompass every interest in Trust. We conclude that Decedent possessed at death a general power of appointment over the entire trust and, because Decedent exercised this power, the value of the entire trust is includible in Decedent's gross estate.

CAVEAT:

A copy of this technical advice memorandum is to be given to the taxpayer(s). Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.